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Introduction to Symposium: The Future of the Exclusionary Rule and the Aftereffects of the Herring and Hudson Decisions

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INTRODUCTION

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The federal exclusionary rule, which is approaching its 100th anniversary,[1] was extended to the states almost fifty years ago by the Supreme Court in its landmark decision of *Mapp v. Ohio*.[2] It has thus defined the legal landscape for the entire career of virtually everyone who practices in a criminal courtroom today.

Numerous decisions have refined the scope of the exclusionary rule and recently the Supreme Court, in *Hudson v. Michigan*[3] and *Herring v. United States*,[4] limited its application in ways that have led some commentators to predict its demise. Whether or not that prediction is warranted, these decisions nevertheless provide an opportunity to reflect on the future of the exclusionary rule and to envision a world without it, even if that is a world many of us would regret.

Justice Kennedy, in his concurrence in *Hudson,* notably stated that "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt."[5] But surely *Hudson* changes the operation of the rule to the extent that its holding—a knock-and-announce violation by the police will not result in the suppression of evidence seized pursuant to a valid warrant—limits suppression even in cases in which evidence derives from intentional, unconstitutional police misconduct, which is the very behavior that the exclusionary rule was designed to address.

Perhaps the seeming incongruity of this result stems from two competing views of the exclusionary rule that have developed in the jurisprudence.

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1. Weeks v. United States, 232 U.S. 383, 398 (1914).
2. 367 U.S. 643, 656-57 (1961).
3. 547 U.S. 586, 594 (2006).
4. 129 S. Ct. 695, 700 (2009).
5. 547 U.S. at 603 (Kennedy, J., concurring).

There is, first, a "majestic conception"[6] of the rule that originates in *Boyd v. United States*[7] and *Weeks v. United States*.[8]

In *Boyd*, the Court wrote, "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . ."[9]

And in *Weeks*, the Court established a procedure, which ultimately became the suppression hearing, allowing a defendant to seek the return of items that had been illegally seized, thus rendering them unavailable to the prosecution at his or her trial:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.[10]

The view expressed in these decisions is concerned with preserving the integrity of the process by which convictions are obtained. It has been referred to as the "imperative of judicial integrity."[11]

But a more ends-oriented approach—the one favored by the Court in *Hudson* and *Herring*—applies the exclusionary rule only where it "result[s] in appreciable deterrence. . . . [W]e have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future."[12] In other words, "the benefits of deterrence must outweigh the costs."[13]

This more pragmatic approach applies the exclusionary rule only where it is necessary to deter police misconduct. Rather than finding that the integrity of the judicial process requires the rule's application in all cases in which the police have violated the Fourth Amendment, the ends-oriented approach is limited to flagrant misconduct of law enforcement. Thus, according to this view, *Weeks* is not so much about the integrity of the judi-

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6. 129 S. Ct. at 707 (Ginsburg, J., dissenting) (quoting Arizona v. Evans, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting)).

7. 116 U.S. 616 (1886).

8. 232 U.S. 383 (1914).

9. *Boyd*, 116 U.S. at 630.

10. *Weeks*, 232 U.S. at 392.

11. Stone v. Powell, 428 U.S. 465, 484 (1976) (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)).

12. Herring v. United States, 129 S. Ct. 695, 700 (2009) (citations omitted).

13. *Id.*

cial process as deterrence of police misconduct: "Not only did [the officers] have no search warrant, . . . but they could not have gotten one had they tried."[14]

This is therefore the view of the exclusionary rule that the Court in *Herring* expresses: "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[15]

A brief survey of the history of the exclusionary rule may help to understand how the Supreme Court has arrived at its current jurisprudence. As we will see, this history reflects a tension between viewing the rule, on the one hand, as upholding the Bill of Rights and the integrity of the Court's processes[16] and, on the other, as punishing law-enforcement misconduct.

Mapp v. Ohio, for example, cited both the "majestic" view of the exclusionary rule and the more pragmatic deterrent rationale. With regard to the former, it stated:

> Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be a form of words, valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom implicit in the concept of ordered liberty.[17]

The Court went so far as to call "the exclusion doctrine—an essential part of the right to privacy,"[18] and warned that, "The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest."[19]

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14. *Id.* at 702.

15. *Id.*

16. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 13 (1968) ("A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.").

17. 367 U.S. 643, 655 (1961) (internal quotation marks omitted).

18. *Id.* at 656.

19. *Id.* at 660.

Yet the *Mapp* decision also acknowledged that the rule is borne out of necessity. It recognized "[t]he obvious futility of relegating the Fourth Amendment to the protection of other remedies"[20] and that "[t]o hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."[21] In other words, pragmatically speaking, because there was a right, a remedy was needed.

The Court again recognized these inherent tensions in the rule in *Stone v. Powell*, where it considered whether to allow habeas petitioners to relitigate their Fourth Amendment claims in federal court if they had had the opportunity to litigate them in state court:

> While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence. The force of this justification becomes minimal where federal habeas corpus relief is sought by a prisoner who previously has been afforded the opportunity for full and fair consideration of his search-and-seizure claim at trial and on direct review. The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights.[22]

Soon after, in *Franks v. Delaware*,[23] the Court again recognized a limitation on the exclusionary rule. In *Franks*, although the Court allowed a defendant to challenge the veracity of the affidavit underlying the search warrant, it limited suppression to those cases in which the warrant depended on perjured or recklessly false statements in the affidavit.[24] Accordingly—and the *Herring* Court would later find this significant—*Franks* allowed suppression of the fruits of an unlawful search only if police misconduct was intentional or reckless and not merely negligent.

In *United States v. Leon*,[25] the Court again limited the exclusionary rule in the search warrant context, removing from its reach the fruits of a warrant that had been executed by officers who reasonably relied on it, even though, as it subsequently turned out, the warrant was not grounded in probable cause.[26] The Court reasoned that applying exclusion in such a case would not "have a significant deterrent effect on the issuing judge or magistrate,"[27] whose error rendered the search unlawful. In so concluding,

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20. *Id.* at 652.
21. *Id.* at 656.
22. 428 U.S. 465, 485-86 (1976) (footnote omitted).
23. 438 U.S. 154 (1978).
24. *Id.* at 155-56.
25. 468 U.S. 897 (1984).
26. *Id.* at 900, 922.
27. *Id.* at 916.

the Court emphasized that the "officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable . . . and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.[28] Accordingly, "[i]n the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause."[29]

Then, foreshadowing *Herring*, the Supreme Court in *Arizona v. Evans* upheld a search conducted by officers who relied on a police record that erroneously indicated the existence of a warrant.[30] The Court reasoned that because the error was ultimately the court's, on whose records the police had relied, police deterrence would not be furthered by exclusion of the evidence so obtained.

The concurrence in *Evans* acknowledged a possible limitation on police reliance on court records:

> While the police were innocent of the court employee's mistake, they may or may not have acted reasonably in their reliance *on the recordkeeping system itself*. Surely it would *not* be reasonable for the police to rely, say, on a recordkeeping system, their own or some other agency's, that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests, even years after the probable cause for any such arrest has ceased to exist (if it ever existed).[31]

Against this background,[32] the Court in *Hudson* and *Herring* was presented with the questions, respectively, of whether a knock-and-announce violation and police negligence in maintaining records of outstanding warrants would trigger the exclusionary rule.

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28. *Id.* at 922-23 (citation and footnote omitted).

29. *Id.* at 926. The Court later applied the reasoning of *Leon* in *Massachusetts v. Sheppard*, 468 U.S. 981, 987-88 (1984), to validate as objectively reasonable a search based on a warrant that contained a judge's clerical error, and in *Illinois v. Krull*, 480 U.S. 340, 349-50 (1987), to validate as objectively reasonable a warrantless administrative search based on a statute later declared to be unconstitutional.

30. 514 U.S. 1, 15-16 (1995).

31. *Id.* at 16-17 (O'Connor, J., concurring); *see also* Herring v. United States, 129 S. Ct. 695, 709 (2009) (Ginsburg, J., dissenting) ("The risk of error stemming from these [electronic] databases is not slim.").

32. The Court has also limited the application of the exclusionary rule outside the context of a criminal trial. *See* Pa. Bd. of Probation and Parole v. Scott, 524 U.S. 357, 369 (1998) (parole hearings); United States v. Calandra, 414 U.S. 338, 354 (1974) (grand jury proceedings).

In *Hudson*, the Court refused to apply the exclusionary rule to a knock-and-announce violation where the police had otherwise acted properly in executing a warrant that suffered no defects. In so deciding, the Court first asserted that the police officers' error—failing to knock and announce their presence—was not a "but-for" cause of obtaining the evidence, which otherwise would have been found when the warrant was executed.[33] In other words, even if the police had knocked and announced their presence, the contraband would still have been seized; if not, the result did not violate the Constitution because the knock-and-announce requirement was not intended to help someone dispose of contraband or prevent its seizure, but to prevent injury and property damage when police enter a residence unannounced.[34] In short, because the exclusionary rule protects against the unlawful seizure of evidence and the knock-and-announce rule does not, the rule did not apply to a knock-and-announce violation.[35]

Second, the Court found that the social cost of applying the exclusionary rule to knock-and-announce violations would be too great.[36] This cost included an anticipated flood of alleged knock-and-announce violations, the determination of which would be hampered by courts' inability to set meaningful standards as to what constitutes a reasonable waiting period for the police before they can forcibly enter a location.[37] Given this uncertainty, police would likely wait longer than necessary, thereby endangering themselves or losing valuable evidence.[38] Such costs outweighed the minimal deterrent value of applying exclusion to knock-and-announce violations, especially because "the increasing[ly] professional[] . . . police forces" of today[39] are already motivated to comply with knock-and-announce requirements in order to avoid dangerous situations and the possibility of having to defend civil lawsuits, including suits brought under section 1983, which did not exist at the time of the *Mapp* decision.[40]

Hudson therefore squarely embraces the deterrent rationale of the exclusionary rule. But at the same time, by characterizing knock-and-announce violations as falling outside core Fourth Amendment interests, *Hudson* does not really reject the view that the exclusionary rule is a necessary correlation of the right to privacy.

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33. *Hudson v. Michigan*, 547 U.S. 586, 592 (2006).
34. *Id.* at 593-94.
35. *Id.* at 594.
36. *Id.* at 595.
37. *Id.* at 595.
38. *Id.*
39. *Id.* at 598.
40. *Id.* at 597-99.

In *Herring*, a police investigator in Coffee County, Alabama, was alerted to the defendant's presence in town. Looking for a reason to arrest him, but finding none, the investigator asked officers in adjoining Dale County whether the defendant had any outstanding warrants. According to the Dale County police department, a felony arrest warrant was outstanding for the defendant, who was quickly arrested as a result. Shortly after, the police discovered that the warrant had been recalled. In fact, the warrant may even have issued in error, but records failed to reflect these facts undermining the basis of the arrest due to negligence by police record keepers.[41]

In concluding that the exclusionary rule did not apply to the fruits of Herring's concededly unlawful arrest, the Court ruled that "the error was the result of isolated negligence attenuated from the arrest."[42] The Court reasoned that the rule was intended to curb police misconduct, and not that of the court (which was implicated in the error), and more importantly that the rule had only been applied when police misconduct was intentional or at least reckless, not merely negligent.[43] The negligent record keeping at issue was insufficiently culpable to justify application of the exclusionary rule, given the rule's deterrence and cost/benefit rationales.

Again the Court embraced a rule grounded in deterrence of police misconduct as opposed to a rule that would seek to preserve the integrity of the judicial process no matter the cost, finding, as it had in *Hudson*, that misconduct that falls below the type of flagrant misconduct that gave rise to the exclusionary rule does not sufficiently threaten Fourth Amendment values so as to warrant its application. Further, again as in *Hudson*, the Court expansively applied an attenuation analysis to acknowledge the Fourth Amendment violation but limit the remedy.

The authors of the articles that follow focus particularly on *Hudson*'s and *Herring*'s reliance on the rule as a deterrent to police misconduct.

Professor Lloyd L. Weinreb, in "The Exclusionary Rule Redux—Again", examines the rule's history and the fugal voices championing either a rights-based or a deterrence-based approach to the rule. Professor Weinreb takes us back to the jurisprudence of Justice Frankfurter and its resonances today, and discusses ways in which the Court's recent decisions that limit the rule's scope—and encourage predictions of its demise—may affect police behavior. He writes,

> The Court's repeated downplaying of the rule and unwillingness to apply it as a remedy for a concrete violation of rights has the effect of making

41. 129 S. Ct. at 698, 705 (Ginsburg, J., dissenting).
42. *Id.* at 698.
43. *Id.* at 701-02.

> the rights themselves seem less urgent and in some, probably considerable, measure implicates the courts in their violation. That, in turn, reduces the deterrent effect of the rule.[44]

Particularly in light of Professor Weinreb's warning, we may wish to consider a recently released report of the New York City Police Department finding that in 2009, a record 575,000 people in New York City—90% of whom were identified as black or Hispanic—were stopped by the police, of whom only 6% were arrested.[45] In the words of the New York Times's editors, if this practice continues, the police may "risk permanently alienating an entire generation of people in the very neighborhoods where trust in the law is most needed."[46] Thus, according to Professor Weinreb and these commentators, not only may erosion of the exclusionary rule affect police behavior, it may also corrode public confidence in the law and its representatives in both law enforcement and the judiciary.

Professor Todd E. Pettys takes a different view. He looks at how the continuation of the exclusionary rule itself may harm public confidence in the judiciary. He focuses on the exclusionary rule's impact on the truth-finding purpose of a jury trial and advances an argument based on moral philosophy. The title of *Instrumentalizing Jurors: An Argument Against the Fourth Amendment Exclusionary Rule* refers to the Kantian imperative that people be treated as autonomous moral actors rather than instrumentalities of others. Professor Pettys argues that the "deliberative autonomy" of jurors is infringed whenever evidence is excluded from their consideration, thus making them instrumentalities of a judge who desires a certain outcome (deterrence of police misconduct) unrelated to the "truth" in a particular case. He argues for abandoning the exclusionary rule and having Congress replace it with legislation that would provide meaningful financial deterrence of police misconduct through punitive damages and attorney fees; in other words, Professor Pettys would let juries, rather than judges, decide how much a constitutional violation is worth.

Professor Donald Dripps in *The "New" Exclusionary Rule Debate: From "Still Preoccupied with 1985" to "Virtual Deterrence"* proposes another alternative to the current exclusionary rule, which he calls a "virtual deterrence" approach. Rather than exclude evidence that has been seized in violation of the Fourth Amendment, courts would only conditionally exclude evidence pending a showing by the police that concrete steps

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44. Lloyd L. Weinreb, *The Exclusionary Rule Redux—Again,* 37 FORDHAM URB. L.J. 873, 886 (2010).

45. Editorial, *Lingering Questions About "Stop-and-Frisk"*, N.Y. TIMES, Feb. 19, 2010, at A26.

46. *Id.*

have been taken to deter future violations. He comes to this proposal via a cost/benefit critique of the deterrence arguments of both the *Hudson* majority and the *Herring* dissent. Professor Dripps argues that the social cost of exclusion should not be attributed solely to the exclusionary rule but also to the Fourth Amendment itself, because even without the rule the Fourth Amendment's warrant and probable cause requirements result in the loss of evidence. But not only does the *Hudson* majority therefore overstate the exclusionary rule's "substantial social costs," so too does the *Herring* dissent overstate the extent to which these decisions encourage lawless behavior. He suggests that his "virtual deterrence rule" would achieve deterrence more effectively than the present rule and would offer judges something more palatable than the current rule, which, he asserts, sometimes results in judges' crediting unworthy police testimony in order to avoid suppression.

Professor Hadar Aviram, Jeremy Seymour, and Professor Richard Leo also address the deterrence rationale that underlies *Herring* and *Hudson*. In *Moving Targets: Placing the Good Faith Doctrine in the Context of Fragmented Policing,* they analyze *Herring* as an example of a crime-control model of judicial thinking, in which law enforcement efficiencies and the realities of daily police work primarily motivated the Court. Those realities, however, bring to light the way in which contemporary law enforcement agencies have evolved into fragmented, rather than coordinated, entities. *Herring's* allowing for police officer negligence, according to the authors, offers a potential for abuse by discouraging collaboration among agencies and incentivizing inefficiencies in recordkeeping.

In *Databases, Doctrine & Constitutional Criminal Procedure*, Professor Erin E. Murphy takes up the thread of the argument that *Herring* encourages police negligence by limiting the exclusionary rule. She considers the history of databases and the way constitutional jurisprudence has evolved to deal with this relatively new source of information-gathering. She analyzes cases from both inside and outside the criminal field that map the intersection of privacy rights and law enforcement needs, and identifies the largely unexplored ways in which databases call for a new way of thinking about the government's compilation and dissemination of information, even if that information is already public. She concludes that the web of information that databases spin requires a more systemic approach than a jurisprudence focused only on individuals in discrete cases, particularly given the number of anonymous actors who contribute to databases and the often unregulated ways in which they do so.

The concerns expressed by these authors and the two suggestions for alternatives to the exclusionary rule continue the debate about the future of the rule. They prompt additional questions: To what extent does the exclu-

sionary rule affect prosecutors, and how would its absence affect their decisions to prosecute and to plea bargain? Similarly, how does the rule affect defense lawyers' calculus of the worth of their cases? What about judges? Has the rule contaminated judicial decisionmaking in the way Professor Dripps suggests? If so, would judges feel free to address police misconduct more forthrightly and effectively if suppression were not typically required when they find a Fourth Amendment violation? Can they craft jury instructions that would sufficiently remedy such a violation? Would replacing the rule with damage remedies work for those, like the poor, with possibly limited access to lawyers? Does *Herring's* requirement that a defendant show gross negligence or recklessness in the police's maintenance of a database disproportionately affect poor defendants, who may not have the resources to challenge systemic police practices? Or are institutional indigent defenders in the best position to mount such challenges? Would state courts find in their constitutions, or would state legislatures impose, an exclusionary rule or a variety of exclusionary rules—or nothing at all—if the federal rule were further limited or abolished? Can legislatures (including Congress) reasonably be relied on to protect the rights of disfavored criminals?

Certainly one may argue that *Herring* and *Hudson* make these questions, and others, more pressing than before. But perhaps, as Justice Kennedy stated in his *Hudson* concurrence, the viability of the rule is not in doubt. These decisions, after all, were made in the context of search and arrest warrants, where judges—even if they may occasionally err—and not just police assure that Fourth Amendment protections are observed.